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No. 99-1346

Supreme Court, U.S.
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In The

Supreme Court of the United States

JERRY KRIM, on behalf of himself and all others similarly situated, and HAROLD L. HARRIS, individually and as Trustee of Mazel, Inc. Profit Sharing Plan,

Petitioners,

v.

A. ROBERT ABBOUD, FRANK C. CIHAK, ROBERT D. RICHLEY, RICHARD RICE, WILLIAM M. ARNOLD, DONALDSON, LUFKIN & JENRETTE SECURITIES CORP., C. IVAN WILSON, ROBERT W. BROWN, DANIEL C. ARNOLD, ROBERT RICE, ROBERT H. ALLEN, J. EVANS ATTWELL, WILLIAM T. BUTLER, M.D., J.A. ELKINS, JR., JAMES H. EVANS, C. JACKSON GRAYSON, JR., ROBERT N. MURRAY, RALPH S. O'CONNOR, AND MARGARET S. WILSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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March 2000

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QUESTIONS PRESENTED

1. May a plaintiff who first files a securities fraud lawsuit and then purchases the defendant's stock cure his lack of standing by:

   - claiming *de facto* standing through an unpleaded, unproven assertion that before suit was filed, his wife used his money to purchase stock for their minor son;

   - asserting for the first time on appeal that the district court should have assumed that he was actually suing as the guardian of his minor son under Rule of Civil Procedure 17(a);

   - arguing for the first time in this Court that although he himself suffered no injury, he had third party standing under this Court's holdings in a peremptory strike case and an abortion rights case?

2. A plaintiff who lacks standing at the outset of a lawsuit cannot breathe life into the "nonexistent" lawsuit by joining new plaintiffs.

   - Were the courts below required to treat the constitutional requirement of standing as a mere technicality?

   - Was the district court required, on its own motion, to order a plaintiff who had already attempted to add another plaintiff with no standing to try yet again?

3. The *American Pipe* doctrine tolls limitations for the claims of putative class members until certification is denied. They may then avoid the bar of limitations by filing a separate lawsuit. Should this Court entertain

QUESTIONS PRESENTED – Continued

the argument – not raised below – that the district court, though it did nothing to prevent putative class members from filing separate lawsuits after it denied class certification, somehow deprived them of the *American Pipe* tolling period?

RULE 29.6 STATEMENT

The caption of the case contains the names of all the parties. Respondent Donaldson, Lufkin & Jenrette Securities Corporation has the following parents and non-wholly-owned subsidiaries:

Parents

1. AXA
2. AXA Financial, Inc.
3. Donaldson, Lufkin, & Jenrette, Inc.
4. The Equitable Life Assurance Society of the United States
5. Equitable Holdings, L.L.C.

Non-wholly Owned Subsidiaries

1. DLJ International Group Holdings
2. DLJ International Group Limited
3. DLJ Long Term Investment Corporation
4. Pershing Trading Company, L.P.

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STATEMENT OF THE CASE

1. Introduction

Reeling from the effects of the recession that gripped Texas in the late 1980's, First City Bancorporation of Texas, Inc. set about restructuring its operations. Together, First City and the Federal Deposit Insurance Corporation developed a complex recapitalization and reorganization plan.

As described in a proxy statement mailed to First City shareholders in January of 1988, the plan's centerpiece was an exchange offer. (Doc. 156, Ex. B). The exchange offer would give shareholders the opportunity to exchange First City common stock – which had become worthless – for new common stock in an entity called New First City and an interest in a new entity called the Collecting Bank. The Collecting Bank would hold and attempt to realize upon First City's non-performing loans. The exchange offer was completed in April of 1988.

Though initially successful, the plan ultimately failed when Texas real estate prices again plummeted. First City's ensuing financial distress resulted in increasingly negative news for its shareholders in the months leading up to this lawsuit.

2. Krim files suit.

In July 1990, Petitioner Jerry Krim sued First City, various of its officers and directors, and Donaldson, Lufkin & Jenrette Securities Corporation – First City's financial advisor for the 1988 reorganization. (Doc. 1). As

the district court observed, Krim has an established track record of claiming securities fraud. Over the years, he has filed a number of similar lawsuits.[1]

Krim purported to represent a class consisting of all persons or entities that bought First City stock between April 20, 1988 (the day after the exchange offer was consummated) and July 3, 1990 (the date Krim filed suit). The lawsuit charged the defendants with making material misrepresentations and omissions in various public statements and documents filed with the Securities and Exchange Commission between 1988 and 1990.

3. The district court denies class certification.

In January of 1991, Krim – who by that time had amended his complaint five times – moved the district court to certify the class. (Doc. 34, 35). During a deposition related to that motion, however, Krim revealed for the first time that he had not purchased First City stock until three days *after* he filed this lawsuit. (Doc. 156, Ex. A at 35). In other words, Krim bought First City stock even though he was fully aware of the alleged fraud made the basis of his lawsuit.

The district court subsequently denied Krim's motion to certify the class because common questions of fact did

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[1] *See, e.g., In re Silicon Graphics, Inc. Securities Litigation*, 183 F.3d 970 (9th Cir. 1999); *Krim v. Pronet, Inc.*, 744 A.2d 523 (Del. Ch. 1999); *United States v. Bleznak*, 153 F.2d 16 (2nd Cir. 1998); *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435 (5th Cir. 1993); *In re Crazy Eddie Securities Litigation*, 792 F. Supp. 197 (E.D.N.Y. 1992).

not predominate over individual issues relating to Krim. (Doc. 52). Later, the district court also denied Krim's motion to reconsider. (Doc. 59 at 1-2).

4. Krim violates the district court's scheduling order by adding a new plaintiff in his sixth amended complaint.

In the same order denying class certification, the district court denied the defendants' motions to dismiss Krim's fifth amended complaint and ordered Krim to file a sixth amended complaint "satisfying the particularities required to establish a claim for securities fraud and for claims under the Securities Act of 1933 or the Securities Exchange Act of 1934." (Doc. 52 at 2). As Judge Edith Jones pointedly observed during oral argument in the court of appeals, the district court's order did not authorize Krim to add new parties. Moreover, the time period for adding new parties in the agreed pretrial order had already expired. (Doc. 5 at 6; Doc. 3 at 1). Nonetheless, without seeking or obtaining leave to do so, Krim filed a sixth amended complaint that purported to add a new plaintiff – Harold L. Harris. (Doc. 62).

The sixth amended complaint alleged that Harris bought his First City stock in October of 1990 – some two and a half months *after* Krim filed suit. (Doc. 62 ¶ 8). Thus, Harris – like Krim before him – was attempting to prosecute a fraud action based on his purchase of stock months after suit was filed and months after the purported fraud was a matter of public knowledge. Harris was therefore no more qualified to assert securities fraud

claims, or to serve as class representative, than Krim. The defendants promptly moved to dismiss, but the district court denied their motions without prejudice and ordered discovery to proceed. (Doc. 66).

5. The aborted settlement and First City's bankruptcy.

During the summer of 1992, Krim, Harris, and some of the defendants agreed to a conditional settlement, subject to court approval after notice to all members of the putative class. The settlement was aborted, however, when the FDIC abruptly seized First City's principal subsidiaries on the ground that they were allegedly insolvent and First City's creditors petitioned it into Chapter 11 bankruptcy. In light of the bankruptcy, the district court stayed the case. (Doc. 104).

6. Krim attempts to add new parties and class action allegations in a seventh amended petition.

The bankruptcy court eventually confirmed a reorganization plan for First City, which included the settlement and discharge of the claims asserted in this case. (Doc. 147, Exs. 1-2). In June of 1997 – after the bankruptcy proceedings were completed – the district court held a status conference. During the conference, the court lifted the stay and issued a scheduling order that: 1) gave Krim permission to file yet another amended complaint – his seventh; 2) provided a briefing schedule for motions to dismiss; and 3) stayed discovery pending resolution of the motions to dismiss. (Doc. 124).

During the status conference, Krim's counsel commented that he might add additional defendants in the seventh amended complaint, but he never mentioned adding new plaintiffs. (Doc. 124 at 25-36). Nevertheless, the subsequently filed seventh amended complaint purported to add five new plaintiffs. (Doc. 132). Recognizing that leave is required to add new parties – a requirement Krim blatantly ignored when he purported to add Harris – Krim also filed a formal motion for leave. (Doc. 131). And despite the district court's denial of class certification years earlier, the seventh amended complaint also purported to assert a class action on behalf of a substantially expanded class of persons. (Doc. 132).

The seventh amended complaint also added new defendants. The claims asserted against them, however, had nothing to do with the purported securities fraud arising out of the 1988 First City reorganization and recapitalization plan.

7. The district court dismisses the case for lack of subject matter jurisdiction, and the Fifth Circuit affirms.

In January of 1998, the defendants jointly moved to dismiss the seventh amended complaint based on the plaintiffs' lack of standing and separately moved to dismiss the plaintiffs' claims on 12(b)(1) and 12(b)(6)

grounds.[2] (Doc. 154, 155, 156). The defendants also opposed the motion to add the five new plaintiffs and moved to strike the class action allegations in the seventh amended complaint. (Doc. 157). Six months later, the district court denied the motion to add new plaintiffs and granted the motion to strike the class action allegations. (Doc. 200).

Subsequently, the district court dismissed the seventh amended complaint and rendered judgment dismissing the case. (Doc. 203, 204). The court concluded that Krim lacked standing because he purchased First City stock after filing suit and did so with full knowledge of the alleged fraud.

The court also found that Krim's attempt to rely on his wife's purchase of First City stock before suit was filed did not give him standing because Krim was not the actual purchaser or owner of those shares. Finally, the district court held that Harris was not a proper party because Krim never had standing and the court therefore never had subject-matter jurisdiction, which meant that Krim had no authority to amend his complaint and add Harris as a new plaintiff. (Doc. 203). Krim appealed the ruling, and the Fifth Circuit affirmed.

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[2] Neither the district court nor the court of appeals addressed the alternative 12(b)(1) grounds asserted by some defendants in the individual motions to dismiss the newly-added state law claims. Moreover, neither of the courts addressed the 12(b)(6) grounds for dismissal.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The courts below correctly held that Krim could not establish standing through his wife or son.

Underscoring that he lacked standing in his own right, Krim first argues he had standing based on his wife's purchase of First City stock for their son in 1988. Alternatively, Krim contends he was entitled to sue on his minor son's behalf as guardian or that he had third party standing to sue on his son's behalf. The court of appeals properly rejected each of those arguments.

A. Krim could not establish standing as a *"de facto"* purchaser of stock.

Krim is forced to seek standing as a *"de facto"* purchaser based on his wife's purchase of stock – a theory unsupported by the case law. He must do so because a plaintiff lacks standing to maintain a federal securities claim in the absence of a loss in connection with an actual "purchase or sale" of a security. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 731-33 (1975); *7547 Corp. v. Parker & Parsley Dev. Partners*, 38 F.3d 211, 226 (5th Cir. 1994). Krim – who did not purchase stock until *after* he filed suit – had no standing in his own right.

According to Krim, his wife used *his* money to buy First City stock in 1988. The seventh amended complaint, however, was devoid of any such allegation, an omission that fully justified the courts below in rejecting Krim's *de facto* purchaser argument. *See Reid v. Hughes*, 578 F.2d 634,

639 (5th Cir. 1978) (plaintiff must plead status as purchaser to establish jurisdiction and failure to do so justifies dismissal). Moreover, Krim never produced any evidence to support his belated contention that his wife bought First City stock with Krim's money.

Finally, even if Krim did pay for his wife's purchase of First City stock in 1988, he still would not have standing. The cases confirm that supplying funds to purchase securities in someone else's name or for someone else's benefit does not confer standing. *See, e.g., Fuchs v. Swanton Corp.*, 482 F. Supp. 83, 88-89 (S.D.N.Y. 1979); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 300 F. Supp. 1083, 1098 (S.D.N.Y. 1969), *aff'd*, 430 F.2d 355 (2d Cir. 1970), *rev'd on other grounds*, 404 U.S. 6 (1971). Thus, Krim's unproven assertion that he supplied the money for his wife's purchase of First City stock could not overcome the fact that he was neither the legal purchaser nor the beneficial owner of the shares acquired in 1988.

B. Krim never attempted to sue as his son's guardian.

For the first time in his reply brief in the court of appeals, Krim argued he should have been permitted to maintain the lawsuit as guardian of his minor son. Krim relies on Rule of Civil Procedure 17(a). The Court need not tarry long with this argument – Krim never raised it in the district court, never invoked Rule 17, and never alleged he was asserting a claim as guardian of or on behalf of his son. *See Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 695 F.2d 893, 903 (5th Cir. 1983) ("We

find that Platoro was not suing in a representative capacity, since it nowhere raised the point in its pleadings."); 5a CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 206 (Supp. 1999) (appellate court has no obligation to conjure up unpleaded allegations and will not accept arguments raised for the first time on appeal).

C. Krim's third party standing argument – asserted for the first time in this Court – is without merit.

Krim asserts for the first time in this Court that he had third party standing under a peremptory strike case – *Powers v. Ohio*, 499 U.S. 400 (1991) – and an abortion rights case – *Singleton v. Wulff*, 428 U.S. 106 (1976). The argument fails for at least two reasons.

First, Krim did not assert third party standing under *Powers* and *Singleton* in the courts below. Absent exceptional circumstances, this Court will not consider issues not pressed or passed upon in the courts below. *See Heckler v. Campbell*, 461 U.S. 458, 468-69 n.12 (1983); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973) ("We cannot decide issues raised for the first time here.")

Second, the Court has held that even a litigant claiming third party standing must have suffered an injury in fact: "Of course, Art. III's requirement remains: the plaintiff must still allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *see also Powers*, 499 U.S. at 410-11. Krim did not suffer an injury in fact because he bought First City stock

after filing suit. To quote the district court, "[t]here can be no traceable connection between Krim's injury in connection with the purchase of his stock and the alleged fraud. One cannot be defrauded when he knows the representations or omissions are fraudulent. *Roberts v. United New Mexico Bank at Roswell*, 14 F.3d 1076, 1081 (5th Cir. 1994)."

2. The district court correctly held that Krim could not establish standing on the basis of his stock purchases after filing suit.

Next, Krim contends he had standing because the defendants allegedly committed wrongful acts after *he* purchased *his* shares of stock. According to Krim, the wrongdoing continued after he filed suit, and he learned of additional wrongful acts during the pendency of the suit. Thus, the argument goes, Krim had standing for purposes of every amended complaint he filed after July 19, 1990 – the date he first purchased stock in First City.

Perhaps recognizing that a party cannot amend to create jurisdiction where it did not exist in the first place,[3] Krim offers no cases to support the notion that he gained *ex post facto* standing. Instead, he seems to argue – based on the dissenting opinion in *Summit Office Park, Inc. v. United States Steel Corp.*[4] and the recent decision in *Baffa v. Donaldson, Lufkin & Jenrette Securities Corp.*[5] – that

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[3] *See Federal Recovery Services, Inc. v United States*, 72 F.3d 447, 453 (5th Cir. 1995).

[4] 639 F.2d 1278 (5th Cir. 1981).

[5] 185 F.R.D. 172 (S.D.N.Y. 1999).

the district court should have, on its own motion, replaced him with a different plaintiff.

A. Standing is not a mere technicality.

The essence of Krim's argument – drawn principally from the dissenting opinion in *Summit Office Park* – is that "technicalities" like standing should not "deny the progress of a valid case." (Petition at pgs. 8-9). In other words, Krim "regard[s] standing as a technicality that the Court should create a way to dispense with. . . . " *Conway Sch. Dist. v. Wilhoit*, 854 F. Supp. 1430, 1436 (E.D. Ark. 1994). The *Wilhoit* court promptly rejected the plaintiff's technicality argument: "the Supreme Court has established the principle that standing provides the 'personal stake in the outcome,' the 'concrete injury,' and the 'specificity' that are crucial to the judicial process. . . . " *Id.*

As another court observed, "standing is not a mere technicality or procedural hurdle. It is a basic question of constitutional law. The Constitution requires that federal judicial power extend only to live 'cases or controversies.' Absent standing there is no such case or controversy because the plaintiff has no right even to present his claims to the court." *United States v. Lorantffy Care Ctr.*, 999 F. Supp. 1037, 1042 (N.D. Ohio 1998) (citations omitted).

B. A plaintiff lacking standing cannot breathe life into a nonexistent lawsuit by substituting new plaintiffs.

If indeed Krim is arguing the district court should have replaced him, he has no viable complaint. "Intervention will not be permitted to breathe life into a 'nonexistent' lawsuit." *McLune v. Shamah*, 593 F.2d 482, 486 (3rd Cir. 1979). The *McLune* court recognized that new plaintiffs cannot be permitted to intervene "to cure a situation in which plaintiffs may have stated causes of action that they have no standing to litigate." *Id.* Similarly, the court in *Summit Office Park* held that "where a plaintiff never had standing to assert a claim against the defendants, it does not have standing to amend the complaint and control the litigation by substituting new plaintiffs, a new class, and a new cause of action." 639 F.2d at 1282.

Where – as here – the plaintiff cannot establish injury in fact at the outset of the lawsuit and therefore lacks standing, the court is simply without constitutional power to hear the case. *See Lang v. French*, 154 F.3d 217, 222 n.28 (5th Cir. 1998). When the court lacks subject-matter jurisdiction for want of the plaintiff's standing, the action must be dismissed and no other issues may properly be reached. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-109 (1998). In short, the district court acted properly by not replacing Krim.

C. *Baffa* is distinguishable.

Krim's reliance on *Baffa v. Donaldson, Lufkin & Jenrette Securities Corp.* is equally unavailing. First, *Baffa* lends no support to Krim's assertion that he himself had standing.

Second, *Baffa* is distinguishable because there the court determined the plaintiff *lost* standing *after* filing suit. 185 F.R.D. at 174. Here, Krim never had standing.

Finally, even if it were not distinguishable, *Baffa* teaches that the interests of the putative class are not necessarily served by ordering a named plaintiff with no standing to find a substitute after the district court denies certification. After determining that Baffa lacked standing and was not a proper class representative because his son owned the stock, the district court denied certification and ordered plaintiff's counsel to substitute another class member. *Id.* Baffa's son and another member of the putative class moved to intervene and sought class certification. *Id.*

Like Baffa, however, his son and the other putative class member were utterly unqualified to serve as class representatives – leaving the district court with no choice but to again deny class certification. *Id.* at 176-77. Thus, the *Baffa* court's willingness to entertain further attempts at producing a suitable class representative proved fruitless and merely prolonged the inevitable.

Here, the district court was all too familiar with Krim's concept of a suitable class representative. After the district court denied class certification in May of 1991, Krim purported to add a new plaintiff – Harold Harris – without seeking or obtaining leave of court and in violation of the scheduling order. Like Krim, however, Harris lacked standing because he purchased his shares of stock almost three months after suit was filed. (Doc. 132 ¶ 11).

Even Harris's belated allegation – appearing more than six years later in the seventh amended complaint –

that he purchased First City stock in 1987 and exchanged it in the 1988 exchange offer – failed to cure his lack of standing. Among other things, Harris offered no reasonable explanation for omitting that allegation from the sixth amended complaint,[6] and his claims based on the 1988 exchange were barred by the statute of repose in the Securities Act of 1933. *See* 15 U.S.C. § 77m.

3. The district court did not deprive putative class members of the *American Pipe* tolling rule.

Krim's final argument is that instead of giving Krim the opportunity to amend his fifth amended complaint, conduct discovery, and attempt settlement, the district court should have dismissed for lack of standing in March of 1991. According to Krim, the court's failure to dismiss at that time somehow deprived putative class members of the *American Pipe* tolling rule – the rule that tolls limitations during the period between the filing of a class action and denial of certification. *See American Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974); *see also Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983).

Krim's position represents a profound misconception of *American Pipe* tolling rule. Under that rule, limitations was tolled for the claims of putative class members from the date Krim filed suit in July of 1990 until the district

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[6] *See In re Southmark Corp.*, 88 F.3d 311, 316 (5th Cir. 1996), *cert. denied*, 519 U.S. 1057 (1997) (district court properly denied leave to amend where plaintiff attempted to add fact known when plaintiff filed original complaint 13 months earlier and offered no reasonable explanation for omission).

court denied certification in May of 1991. *See Salazar-Calderon v. Presidio Valley Farmers Assoc.*, 765 F.2d 1334, 1351 (5th Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986). Once the court denied certification, limitations began to run, and any putative class member could have then filed an individual claim in a separate lawsuit. Nothing the court did after denying class certification prevented putative class members from doing so.

In any event, Krim did not raise this argument in the courts below. Accordingly, the Court need not now consider it. *See Campbell*, 461 U.S. at 468-69 n.12; *Tacon*, 410 U.S. at 352.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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